

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:16-cv-468-MOC
(3:99-cr-190-MOC-1)**

KENNETH O'BRIAN POWELL,)	
)	
Petitioner,)	
)	
vs.)	ORDER
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
)	

THIS MATTER is before the Court on Petitioner's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, (Doc. No. 1), and in light of Petitioner's Supplemental Memorandum, (Doc. No. 11), in which Petitioner concedes that his claim is time-barred. Petitioner is represented by the of the Office of the Federal Public Defender of Western North Carolina.

Petitioner pled guilty in the underlying criminal case to interstate violation of a protective order and kidnapping. (3:99-cr-190, Doc. No. 23). The Presentence Investigation Report found that Petitioner qualifies as a career offender. See (Id., Doc. No. 27). The Court sentenced Petitioner to a downward departure sentence of a total of 240 months' imprisonment.¹ (Id., Doc. No. 28). He did not appeal.

In 2001, Petitioner filed a § 2255 Motion to Vacate alleging, *inter alia*, that counsel failed to file a notice of appeal pursuant to his request, case number 3:01-cv-669. The Court granted relief on Petitioner's claim of ineffective assistance of counsel and dismissed the remaining claims without prejudice. The Court entered an Amended Judgment to permit Petitioner to file a direct

¹ Petitioner is currently serving a 21-month sentence following the revocation of his supervised release. See (3:99-cv-190, Doc. No. 58).

appeal. (Id., Doc. No. 34). The Fourth Circuit Court of Appeals affirmed. United States v. Powell, 62 Fed. Appx. 543 (4th Cir. 2003).

Petitioner filed a § 2255 Motion to Vacate in 2004, arguing that his guilty plea was involuntary, he received ineffective assistance of counsel, and his sentence exceeded the statutory maximum and was miscalculated, case number 3:04-cv-412. The Court denied and dismissed the § 2255 petition. Powell v. United States, 2005 WL 3441247 (W.D.N.C. Dec. 14, 2005).

On June 26, 2015, the Supreme Court held in Johnson v. United States that the residual clause of the Armed Career Criminal Act (“ACCA”) – which covered any offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another” – is “unconstitutionally vague.” 135 S.Ct. 2551, 2557 (2015). Based on that holding the Court concluded that “imposing an increased sentence under the residual clause … violates the Constitution’s guarantee of due process.” Id. at 2563. On April 18, 2016, the Supreme Court held in Welch v. United States, 136 S.Ct. 1257, 1265 (2016), that Johnson is retroactively applicable on collateral review to claims that the defendant was improperly sentenced as an armed career criminal.

On June 23, 2016, Petitioner filed the instant § 2255 Motion to Vacate through counsel, raising a Johnson claim.² (Doc. No. 1); see (Doc. No. 1-1) (Fourth Circuit’s Order granting authorization to file a second or successive § 2255 petition). On August 9, 2016, the Court placed the § 2255 proceedings in abeyance pending the outcome of Beckles v. United States, Supreme Court No. 15-8455, in which the petitioner argued that his career offender sentence was erroneously enhanced by an unconstitutionally vague residual clause of U.S. Sentencing Guidelines § 4B1.2. (Doc. No. 4). On March 6, 2017, the Supreme Court held in Beckles that “the

² Petitioner asserts that, even though the Court imposed a downward departure sentence, the sentence still exceeded the non-career offender range.

advisory Guidelines are not subject to vagueness challenges.” 137 S.Ct. 886, 890 (2017). The Court reasoned that, because the guidelines are not mandatory, due process is not implicated. Beckles did not, however, resolve the question of whether Johnson’s constitutional holding applies retroactively to those defendants, like Petitioner, who were sentenced before United States v. Booker, 543 U.S. 220 (2005), when the Sentencing Guidelines were mandatory rather than advisory.

On May 4, 2017, the Court granted a motion to stay these proceedings pursuant to United States v. Brown, No. 16-7056, in which the pre-Booker Sentencing Guidelines issue was pending before the Fourth Circuit. (Doc. No. 7). On August 21, 2017, the Fourth Circuit decided United States v. Brown, holding that Johnson does not apply to cases in which defendants were sentenced under the pre-Booker Sentencing Guidelines. 868 F.3d 297 (4th Cir. 2017). The Fourth Circuit denied rehearing en banc, United States v. Brown, 891 F.3d 115 (4th Cir. 2018), and the Supreme Court denied certiorari, Brown v. United States, 2018 WL 2877128 (U.S. Oct. 15, 2018).

On November 7, 2018, Petitioner filed a Supplemental Memorandum in light of the Supreme Court’s denial of certiorari in Brown. (Doc. No. 11). In the Supplemental Memorandum, Petitioner states that the parties agree that, based on the denial of certiorari, Petitioner’s claim is foreclosed by Brown as untimely. As Petitioner concedes that his § 2255 petition is untimely, it will be denied and dismissed.

Finally, the Court notes that Petitioner seeks an order from the Court granting a certificate of appealability. Petitioner essentially contends that reasonable jurists would disagree over the constitutionality of the Court’s denial of a motion to vacate as untimely in which a petitioner raises a Johnson claim where the petitioner was sentenced pre-Booker. The Court recognizes that Chief Judge Gregory wrote a dissent in the Fourth Circuit’s Brown decision arguing that the petitioner

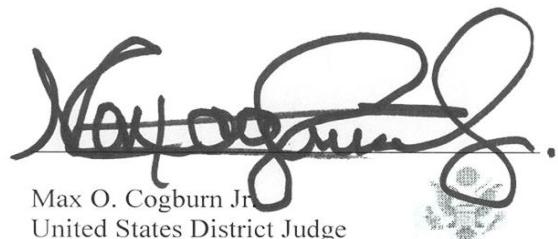
there should be entitled to relief under Johnson and Beckles. The Court also recognizes that Justice Sotomayor wrote a dissent in the Supreme Court's decision denying the petition for certiorari in Brown, in which Justice Ginsburg joined. Nevertheless, the Court of Appeals' decision in Brown is binding. Whether this Court or other reasonable jurists may differ on whether Brown was correctly decided, it cannot reasonably be disputed that the holding of Brown is binding on this Court and on subsequent panels of the Court of Appeals.

As Brown is now settled law in this circuit, the Court declines to grant a certificate of appealability in this action. The Court finds that the Petitioner has not made a substantial showing of a denial of a constitutional right. See generally 28 U.S.C. § 2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 322, 366-38 (2003) (in order to satisfy § 253(c), a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong"); (citing Slack v. McDaniel, 529 U.S. 473, 484-85 (2000)). Petitioner has failed to demonstrate both that this Court's dispositive procedural rulings are debatable, and that the Motion to Vacate states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85. As a result, the Court declines to issue a certificate of appealability. See Rule 11(a), Rules Governing Section 2255 Proceedings in the United States District Courts, 28 U.S.C. § 2255.

IT IS THEREFORE ORDERED that Petitioner's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, (Doc. No. 1), is **DENIED** and **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that the Court declines to issue a certificate of appealability.

Signed: November 19, 2018



Max O. Cogburn Jr.
United States District Judge